No. 95-5996

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DAVID J. CARPENTER, *Petitioner*,

v.

JAMES H. GOMEZ, Director, California Department of Corrections, and ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Respondents*.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FERN M. LAETHEM
California State Public Defender

KENT BARKHURST
* ROBERT D. BACON

Deputy State Public Defenders
221 Main Street, Suite 1000
San Francisco, CA 94105
Telephone: (415) 904-5600

Counsel for Petitioner

* Counsel of Record

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ARGUMENT

RESPONDENT OFFERS NO SOUND REASONING FOR THIS COURT TO DENY THE PETITION FOR WRIT OF CERTIORARI

A

Although respondents' opposition is lengthy, it conspicuously lacks extended analysis of the two questions presented by Mr. Carpenter in the petition for certiorari. The question the respondents present -- "Depending on the circumstances, may juror misconduct be subject to a harmless error analysis?" (Opp. i; see id. at 7) -- is not one of the questions presented by the petition,

by the facts of this case, or by the decision of the state court below. The answer to the respondents' question is undoubtedly yes, under some circumstances other than those presented here, jury misconduct can be harmless error.[1] Moreover, that unremarkable question would not be worthy of review by this Court. But respondents' analysis is irrelevant to the point made in the petition: that the two very different questions Mr. Carpenter actually presents are deserving of review by this Court.

As explained on pages 12-15 of the petition, trial before a biased factfinder can never be harmless error. Quoting Smith v. Phillips, 455 U.S. 209, 215 (1982), respondents argue that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Opp. 14. Here there was such a hearing, and Mr. Carpenter proved actual bias or, more exactly, the prosecution failed to overcome the presumption of prejudice by proving its absence. The judge who heard Juror Durham and the other witnesses testify about her misconduct found that she was not an impartial juror. RT 1693, 1696. At that point, without more, the remedy is reversal of the judgment. Tumey v. Ohio, 273 U.S. 510, 535 (1927). Certiorari should be granted because the state supreme court held otherwise.

Respondents put the present case on the other side of the line between "actual" and "implied" bias than did the state trial judge who heard the witnesses and made the findings of fact,

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1. Approaching the case as respondents do, as merely an instance of "jury misconduct" rather than as a case tried by a biased juror, would seem to lead to a perverse and counter-intuitive rule which would require automatic reversal when the factfinder is biased for systemic or institutional reasons not indicative of personal turpitude on his or her own part, e.g., Tumey v. Ohio, 273 U.S. 510 (1927), but would allow for a finding of harmless error when, as here, the factfinder is biased because of his or her own misconduct. Not surprisingly, none of the cases respondents cite support such an unacceptable rule. The rule that a biased factfinder requires automatic reversal has no exception for cases in which the factfinder is biased as a result of misconduct on his or her part.

by inappropriately drawing different inferences from the testimony than he did. Opp. 18-19.[2] In this passage of the opposition, respondents confuse the line between "actual" and "implied" bias with the very different line between bias proved by direct evidence and bias proved by circumstantial evidence. Juror Durham's actual bias was proved only by circumstantial evidence because her misconduct extended to lying under oath at the post-trial evidentiary hearing and denying that she had committed misconduct at all. Equating actual bias with direct evidence, as respondents do, would inappropriately make it more difficult to obtain relief in those cases where the juror's misconduct is more serious and extends to testifying falsely under oath. Three members of this Court analyzed the issue very differently than do respondents: "in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial." McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984) (Blackmun, J., concurring, joined by Stevens & O'Connor, JJ.). In the same vein, Justice O'Connor wrote separately in Smith v. Phillips, supra, "to express my view that the opinion does not foreclose the use of 'implied bias' in appropriate circumstances." 455 U.S. at 221 (O'Connor, J, concurring). Addressing the issues which respondents fail to confront, she said:

> Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it. The problem may be compounded when a charge of bias arises from juror misconduct, and not simply from attempts of third parties to influence a juror.

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2. Although the state supreme court erred in its legal analysis, it properly set forth the facts as found by the superior court judge at the evidentiary hearing. 9 Cal.4th at 642-43, quoted on pages 4-5 of the petition. Respondents inappropriately provide, in the "Argument" portion of their opposition, a statement of facts that, without differentiation, mixes testimony which the hearing judge did and did not find persuasive and credible. Opp. 8-11. The Court should not rely on respondents' version of the evidence taken at the hearing.

Id. at 222. See also Federal Rule of Evidence 606(b) and California Evidence Code § 1150, both precluding evidence of the effect of particular events on a juror's mental processes and thereby reducing the likelihood that juror bias can be proved by direct evidence.

Respondents' arguments do not withstand analysis because the state court judgment they are defending cannot withstand analysis. In Tumey v. Ohio, supra, the state argued that since "the evidence shows clearly that the defendant was guilty ... he can not complain of a lack of due process" by being tried by a judge with an interest in deciding the case against him. The Court responded, "No matter what the evidence was against him, he had the right to have an impartial judge." 273 U.S. at 535. In California, after the decision in the present case, the strength of the evidence is relevant in determining whether or not the factfinder was biased in the first place. 9 Cal.4th at 655. That holding cannot be reconciled with Tumey.

Certiorari should be granted because the court below has strayed far from well-established federal constitutional principles. Its position as the highest court in the most populous state magnifies the need for a grant of certiorari. All the many state courts of California will be required to follow the erroneous decision in this case unless certiorari is granted. Moreover, the California Supreme Court reviews a large number of capital cases, and the petition demonstrates that in these cases it frequently misapplies harmless error rules in much the same way as it did here.

B

Respondents' position is that the error which occurred in this case is subject to harmless error analysis. Conspicuously absent from the opposition is any discussion of the standard which would be applied if the error were subject to harmless error analysis: the "beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18, 24 (1967). Respondents have no answer for Mr. Carpenter's argument in section 2.B of his petition (pp. 15-21) that certiorari should be granted

because in this and other capital cases the California Supreme Court has erred by applying a standard of prejudice more tolerant of federal constitutional error than the Chapman standard. Indeed, respondents quote approvingly the California Supreme Court's standard under which relief is to be denied unless "it is substantially likely the juror was actually biased." Opp. 17, quoting 9 Cal.4th at 653. That is not the Chapman standard which requires the prosecution to prove the error harmless beyond a reasonable doubt. Section 2.B of the petition demonstrates that this is just one of many capital cases in which the California Supreme Court has eased the prosecution's burden of proving constitutional error harmless, or shifted the burden in whole or part to the defendant.

C

Respondent depends entirely on Romano v. Oklahoma, 512 U.S. __, 129 L.Ed.2d 1 (1994) to contend that petitioner's case is so clearly outside Caldwell v. Mississippi, 472 U.S. 320 (1985) as to be unworthy of this Court's consideration. As set forth in the petition at pages 7 through 11, the death verdict in Romano was distinctly more reliable than the verdict in the present case partly because the information affecting the jury's sense of responsibility was admitted into evidence, whereas the information obtained by Juror Durham in the present case was obtained outside court without the knowledge of the parties.

Respondents appear also to argue that petitioner's Caldwell claim is meritless because petitioner has not demonstrated Durham was prejudiced by learning about the prior death sentences. Opp. 18. They attempt to graft the two-prong state-law test, created by the California Supreme Court in addressing the jury misconduct claim, onto Caldwell error, and conclude that the effect of the information on Durham was "speculative at best." Ibid. This confusing analysis comports with neither Caldwell nor Romano. Under Caldwell, the diminished sense of a juror's responsibility undermines the Eighth Amendment's reliability requirement regardless of whether petitioner can

demonstrate empirically that the effect was to bias the judgment toward death. Caldwell, 472 U.S. at 341. Nothing in Romano holds otherwise. There is language in Romano noting the impossibility of knowing how the evidence of a prior death sentence might have affected the jury, but this is in the prejudice analysis of Romano's due process claim, not his Caldwell claim. See Romano, __ U.S. at __, 129 L.Ed.2d at 14.

In the present case there is an uncontested factual determination that the information obtained by juror Durham through misconduct diminished her sense of responsibility for the penalty decision at petitioner's trial. The California Supreme Court's analysis of the Caldwell issue was both perfunctory and incorrect. Certiorari should be granted to clarify the confusion created by the state court's decision and to establish how extraneous information obtained by juror misconduct that diminishes a juror's sense of responsibility may violate the Eighth Amendment as interpreted by Caldwell and Romano.

D

Respondents make a halfhearted suggestion, without citation of authority, that the judgment of the state court lacks finality. Opp. 19-20. They are mistaken, on both doctrinal and pragmatic levels. Initially, it is well established that a judgment finally resolving a collateral writ proceeding such as this one is a final judgment for purposes of review by this court, even though the underlying case remains pending in state court and further proceedings are contemplated. See, e.g., Fisher v. District Court, 424 U.S. 382, 385 n.7 (1976); Rescue Army v. Municipal Court, 331 U.S. 549, 565 (1947); Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 14 (1931). Insofar as the present case differs from those, the present case is even more appropriate for review. In the typical case involving, for instance, a pretrial writ of prohibition, the underlying lawsuit is already on file and must be disposed of by the state court. Here, on the other hand, the California Supreme Court merely

left open the possibility of Mr. Carpenter filing a new state habeas corpus petition. There is no such petition currently on file and no assurance that one will be filed.

More fundamentally, the state court's invitation to relitigate the issue is bound up with the federal constitutional error it committed. The state court invited Mr. Carpenter to file a new petition "based upon the combined records of the habeas corpus proceedings and the underlying trial." 9 Cal.4th at 659. As demonstrated at length in the petition for certiorari, pp. 12-15, as a matter of federal constitutional law, the record of the underlying trial is irrelevant to Mr. Carpenter's entitlement to relief. He is entitled to relief now, on the present record. The state court's invitation to file a new petition is merely an artifact of its erroneous belief that it could look to the record of the underlying trial in deciding whether Mr. Carpenter was tried by a biased factfinder, and whether he was prejudiced.

The judgment below is final; the issues presented in the petition are ripe for review now, on the present record.

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CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Supreme Court of California should be reversed.

Dated: October 19, 1995

Respectfully submitted,

FERN M. LAETHEM
California State Public Defender

KENT BARKHURST
Deputy State Public Defender

ROBERT D. BACON
Deputy State Public Defender
Counsel for Petitioner

* Counsel of Record

ORIGINAL

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CERTIFICATE OF FILING AND SERVICE

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

I, KENT BARKHURST, Attorney at Law, certify that pursuant to Rule 29 of this Court, the Reply To Brief In Opposition to Petition For Writ Of Certiorari, was filed and served with the Clerk of this Court and on counsel for respondents by depositing said Reply and copies thereof, in the United States Mail at San Francisco, California, on October 19, 1995, by First Class Mail, postage prepaid.

Service was made upon counsel for all respondents at the following address:

CARL HORST, Deputy Attorney General
110 West A Street, Suite 1100
San Diego, California 92101
(619) 645-2001

All parties required to be served have been served. I am a member of the Bar of this Court and am counsel for petitioner. I certify under penalty of perjury that the foregoing is true and correct.

Signed on 10/19/95

KENT BARKHURST
Attorney for Petitioner
221 Main Street, Suite 1000
San Francisco, California 94105
(415) 904-5610